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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

BAIYWO ROP,

Plaintiff,

v. **CASE NO. 2017-CA-009484-O**

ADVENTIST HEALTH SYSTEM d/b/a FLORIDA HOSPITAL,

Defendant.

DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Defendant, Adventist Health System d/b/a Florida Hospital ("Florida Hospital"), through its undersigned counsel moves this Court for the entry of a judgment in its favor and against Plaintiff awarding Florida Hospital its reasonable attorneys' fees and costs incurred in defending this matter as set forth below.

I. Introduction and Procedural History

Plaintiff, a former resident in Defendant's radiology residency program, filed his complaint in this matter on October 25, 2017. In his complaint, Plaintiff alleged four causes of action under the Florida Civil Rights Act ("FCRA"): disparate treatment race discrimination; disparate treatment national origin discrimination; disparate treatment handicap discrimination; and retaliation. These claims related to Plaintiff's remediation, probation, and dismissal from the radiology residency

program for not successfully completing the requirements of the program.

The parties engaged in discovery preparing for an initial trial date of October 18, 2018. Before the first pre-trial, the parties jointly sought an extension of the discovery deadline and trial deadlines, and the trial was re-set for January 22, 2019. However, prior to the second pre-trial conference and discovery deadline, the deadlines were once again extended and the trial was re-set for February 18, 2019. This time, the pre-trial conference took place on January 16, 2019 with no extension prior to the January 15, 2019 discovery cut off. Thus, as of January 15, 2019, Plaintiff had already had two years and three months to engage in discovery.

Indeed, Plaintiff was permitted to engage in all available forms of discovery and did so: taking seven (7) depositions including one via videotape; propounding two sets of interrogatories with 27 total interrogatories; and serving two sets of requests for production of documents containing 42 categories of documents, as well as one set of requests for admission. After some discovery, Plaintiff filed a motion to amend his complaint seeking to add a claim on a different theory – failure to accommodate a handicap under the FCRA. Plaintiff abandoned this motion and decided not to pursue this theory.[1]

At the January 16, 2019 pre-trial, this case was re-set for the fourth time for a

[1] Because of some of the theories proffered by Plaintiff's counsel in various pleadings and during pre-trial discussions amongst counsel, Defendant sought, in its pre-trial motion in limine, to preclude Plaintiff from arguing this theory of liability at trial. Plaintiff admitted at hearing on same he did not intend to pursue such theory despite having previously filed the motion to add it to the claim.

trial period of June 3, 2019. Thereafter, a new judge was assigned, and at the next pre-trial the matter was re-scheduled for April 13, 2020. Then, due to the world-wide pandemic, the trial was re-set and scheduled for April 2021. Given the pandemic and COVID safety protocols, a courtroom was unavailable for jury selection and trial until May 14, 2021, when this case was tried.

On March 17, 2020, Plaintiff filed a motion to compel related to the first two requests of Plaintiff's Second Request for Production of Documents, which Defendant initially responded to on December 31, 2018 and supplemented on April 9, 2019.

In advance of the August 27, 2020 hearing, on August 14, 2020, the parties discussed the motion to compel. On August 26, 2020, the parties reached an agreement regarding what documents would be produced to resolve the Motion to Compel and defense counsel confirmed in writing the parties' agreement. Plaintiff's counsel cancelled the motion to compel hearing. On November 19, 2020, Plaintiff received a confidentiality agreement to be completed prior to document production, which Plaintiff returned on December 7, 2020. The agreed-upon supplemental documents were produced on December 22, 2020. There was no additional indication of a discovery dispute until Plaintiff called up the motion to compel for hearing April 15, 2021, more than a year after it had been filed and after six pre-trial conferences (which served as discovery cut off dates) despite the Court's clear and

consistent orders and rules that all discovery be completed prior to a pre-trial conference (*see* Uniform trial Orders dated 1/24/2018, 8/20/2018, 11/28/2018, 2/5/2018, 5/30/2019, 8/14/2020 and 3/29/2021). After the hearing, Plaintiff's motion to compel was denied. Plaintiff did not pursue any additional discovery in this matter.

On April 15, 2021, this Court also heard Defendant's Motion in Limine directed at obtaining preliminary pre-trial rulings on certain evidence at trial. The following preliminary determinations were made:

1. Plaintiff could not reference remarks allegedly made by individuals not decision makers in the at-issue employment actions;

2. Plaintiff could not argue a theory of failure to accommodate Plaintiff at trial as he failed to pursue such a claim (Plaintiff admitted and agreed to this relief);

3. Plaintiff could not present to the jury evidence describing physical symptoms of his alleged disability because it was unnecessary in light of the fact Defendant stipulated for proof purposes at trial Plaintiff was "handicapped" as that term is understood under the FCRA;

4. Plaintiff could not present to the jury argument or evidence about any equitable damages including backpay; and

5. Plaintiff was precluded from referencing the performance of co-workers as Plaintiff could present no evidence that would cause a jury to believe such co-

workers were similarly situated as that term is defined under applicable law.

In response to the last preliminary ruling, Plaintiff argued he should be able to reference the performance of other residents because in a "termination letter" he was provided when he was dismissed from the program, Florida Hospital referenced that his performance was below that of his peer average. (Trial Ex. 11.) However, as this Court noted and later put on the record in discussion of this topic, neither the termination letter's reference nor anything else Plaintiff could point to established as a threshold that any other resident in the program had engaged in behaviors similar to those Plaintiff had been accused of engaging in (i.e., not being able to perform up to minimum standards required) (TR 5/20/21, 98: 4-8). Thus, pursuant to applicable law, no "comparators" existed and evidence relating to other co-workers was found to be irrelevant and merely a distraction that would improperly create unnecessary mini-trials confusing the jury.

At this point, Plaintiff's lack of proof to prevail was appallingly obvious. Without any evidence available to present relating to any true comparator, there was no way Plaintiff could possibly prevail on any of his discrimination claims. Regardless, Plaintiff proceeded.

On May 14, 2021, a jury was empaneled, and from May 17 through May 21, Plaintiff proceeded and presented evidence. Then, on Friday May 21, after four and a half days of Plaintiff presenting evidence and argument to the jury, Plaintiff rested

his case and Defendant made an oral motion for a directed verdict on all four counts. (TR 5/21/21, 92 – 133.)

Significantly, and in accordance with the motion in limine and the lack of any evidence of a comparator being treated more favorably than he was, Plaintiff had produced absolutely no evidence of any similarly situated employee outside of any of the three protected classes at issue treated more favorably than him. At one point during the trial and at a side-bar conference, Plaintiff asked to proffer and make a record of his own testimony allegedly describing peers who were treated more favorably than he was. (TR 5/20/21, 98:9-13.) However, after discussion at side-bar, Plaintiff noted he would not make such proffer and instead would voluntarily abide by the Court's ruling that, on the record before it, testimony by Plaintiff about his co-workers' alleged treatment would not be allowed. (TR 5/20/21, 98:9 – 100:19). Therefore, Plaintiff never attempted to present, and indeed never offered any, evidence about any co-worker the jury could even consider as potentially having been treated more favorably than Plaintiff – a key element of proof required to be established for the three discrimination claims being prosecuted.

Indeed, after having over three years of opportunity during discovery, Plaintiff was unable during presentation of evidence to the jury in this matter, to present any evidence at all of discrimination based on any disability or based on national origin (or race). Accordingly, after Plaintiff's opportunity to present any available relevant

admissible evidence, a directed verdict was granted as to the disability and national origin discrimination claims.

Notably, in opposing the motion for directed verdict as to race, Plaintiff amazingly argued he did not have to follow the law – the very law he had agreed to allow the judge to read to the jury before presentation of any evidence. Specifically, Plaintiff argued an Eleventh Circuit case, *Smith v. Lockheed-Martin*, 644 F.3d 1321 (11th Cir. 2011), wherein the court determined the plaintiff did not need to follow the *McDonnell Douglas* burden shifting to prevail in a race or gender discrimination claim and could instead proceed under a convincing mosaic theory. Defendant argued no Florida or federal court had applied the convincing mosaic standard in an FCRA case and a Florida court had specifically rejected its application. *See Johnson v. Great Expressions Dental Ctrs. of Fla., P.A.*, 132 So. 3d 1174 (Fla. 3d DCA 2014).

While the Court was constrained in terms of time due to the logistics of limited courtroom space due to COVID restrictions and the length of Plaintiff's case in chief, the Court appropriately took the novel argument under advisement and reserved ruling on Defendant's motion for directed verdict as to the race discrimination claim. The Court also took reserved ruling on the retaliation claim. (TR 5/21/21, 133:3-11).

After Defendant presented its case, Defendant again argued for directed verdict on the race discrimination and retaliation claims. The Court continued to

reserve ruling on those claims, closing arguments were presented and the jury deliberated. The jury returned a provisional verdict (in favor of Plaintiff on his race claim and against Plaintiff on his retaliation claim) pending the Court's decision on the remaining directed verdict motions.

Thereafter, on Friday, May 28, 2021, this Court issued its Order on Directed Verdicts and Final Judgment for Defendant determining there was no reasonable evidence presented upon which the jury could have legally predicated a verdict in favor of Plaintiff on the race discrimination claim. Specifically, the Court determined Plaintiff did not prove a *prima facie* case in failing to proffer reasonable evidence that race was a factor in his termination. The Court determined even if Plaintiff established a *prima facie* case, Plaintiff wholly failed to show Defendant's non-discriminatory reason for dismissal was pretextual or otherwise show race was a motivation in the employment decisions.[2] The Court then ordered judgment be entered in favor of Florida Hospital on all claims.

II. Florida Hospital is Entitled to an Award of Costs Expended in Defending this Matter

A. The FCRA Provides for Attorneys' Fees to a Prevailing Party

Section 760.11(5), Florida Statutes, provides, in pertinent part, "…In any action of proceeding under this subsection, the court, in its discretion, may allow the

[2] The Court did not specifically grant or deny the reserved motion for directed verdict on the retaliation claim as the jury found Florida Hospital did not retaliate against Plaintiff.

prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." In interpreting this section, it is well settled an award of attorneys' fees to a prevailing defendant is appropriate when the plaintiff's claims were frivolous, unreasonable or groundless or if the plaintiff continues to litigate after it clearly becomes so. *See CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S.Ct. 1642 (2016) (citing *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)).

First, it cannot be disputed Florida Hospital is a prevailing Defendant on all four claims brought in this lawsuit. This Court granted directed verdicts on three of the four claims (race, national origin, and handicap discrimination) and the jury returned a verdict in Florida Hospital's favor on Plaintiff's retaliation claim prior to and mooting the Court's decision on directed verdict on that claim. (TR 5/21/21 Verdict; Order on Directed Verdicts). The Court entered judgment retaining jurisdiction to determine entitlement and amount of attorneys' fees and costs. (Order on Directed Verdict.)

In assessing attorneys' fees in favor of a prevailing defendant, courts are guided by three factors, the application of which is not intended to be rigid: (1) whether the plaintiff established a *prima facie* case; (2) whether the defendant offered to settle; and (3) whether the court dismissed the case prior to trial or held

trial proceedings on the merits. *See Sullivan v. Sch. Bd. of Pinellas County*, 773 F.2d 1182, 1189 (11th Cir. 1985) (awarding fees to defendants in Title VII actions should be made on a case by case basis). The following analysis demonstrates Plaintiff's entire action was misconceived, and he obstinately and needlessly prosecuted against, and despite, long standing employment discrimination and retaliation law and, more fundamentally with no evidence of a factual basis to do so.[3]

1. Plaintiff's Race Discrimination Claim

As agreed upon by the parties in submission of the issues instruction to the jury in this matter, to prevail on a claim of race discrimination under the FCRA, in addition to the Parties' stipulation Plaintiff is Black, Plaintiff was required to prove: he was subject to an adverse employment action; he was qualified to be a resident in Florida Hospital's radiology residency program; and he was treated less favorably than a similarly situated non-Black resident. Indeed, Plaintiff conceded even before trial that, to prevail, he would need to show "someone similarly situated to him was treated more favorably than him." (TR Hearing 4/15/2021 at 18:16-19.)[4] Plaintiff acknowledged various facts he is required to establish to prevail including that, "someone in his protected class was treated more favorably than him," and further

[3] Although the ultimate lack of evidence available after protracted discovery establishes Plaintiff's claims were ill conceived from the start, at the very least, Plaintiff's should have known he would have no chance under applicable law to establish any of his claims at the close of discovery which was January 15, 2019.

[4] A hearing transcript will be referenced as "TR Hearing [Date]" with the page and line numbers delineated as ___:___. The trial transcript will be delineated in similar fashion, i.e., "TR Trial [Date] at ___:___."

commented, "we have to present evidence to get beyond a directed verdict on all of those elements."[5] (TR Hearing 4/15/21 at 19:5-9.)

However, the only evidence Plaintiff could identify at trial supporting his theory Florida Hospital's decision to dismiss him from the residency program was based on his race consisted of the following: Plaintiff is Black and Florida Hospital dismissed Plaintiff from the program. While it is eminently clear under the law this is insufficient to establish actionable discrimination, he continued to push this case through trial even rejecting an offer of judgment made as an effort by Florida Hospital to avoid protracted litigation and incur additional costs of litigation.[6] *Lanier v. Bd. of Trs. of the Univ. of Ala.*, 2014 WL 657541 (N.D. Ala. Feb. 20, 2014) (mere fact employee is in a protected class and mistreated does not translate into evidence the mistreatment was motivated by the protected status). This Court recognized the dearth of evidence suggesting race discrimination in its Order on Directed Verdicts commenting:

> The Court has carefully considered all of the evidence presented at trial and reviewed the applicable law. The Court finds that the Plaintiff did

[5] While Plaintiff later argued, in opposition to the motion for directed verdict on this claim, he did not have to provide evidence a similarly situated non-Black employee was treated more favorably, such argument was not only contradictory to what he had previously acknowledged, but also inconsistent with applicable law. As Plaintiff argued, within the jurisprudence developed applicable to Title VII, the Eleventh Circuit in *Smith* determined that, under certain circumstances, a plaintiff attempting to establish race discrimination need not provide evidence of a similarly situated comparator outside plaintiff's protected class was treated more favorably. In *Smith*, the plaintiff was alternately allowed to proceed past summary judgment by proffering evidence suggesting "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Smith*, 644 F.3d. at 1328. However, as Florida Hospital noted and as the case law bears out, such theory is not available to a plaintiff only pursuing a claim under the FCRA.

[6] The proposal of settlement included a condition Plaintiff execute a proposed settlement agreement which specifically set forth an agreement Florida Hospital denies all liability and any wrongdoing in this matter and was only proposed because Florida Hospital wished to avoid litigation and settle and resolve the controversy amicably and expeditiously.

> not prove a prima facie case of unlawful discrimination based on race under the Florida Civil Rights Act. Specifically, the Plaintiff failed to proffer reasonable evidence that race was a factor in his termination from the Radiology Residency Program.

Because Plaintiff could not point to anything at trial suggesting a non-Black co-worker was treated more favorably, Plaintiff is expected to argue this Court's preliminary evidentiary ruling precluding him from presenting evidence of his co-workers' performances prevented him from being able to prove his case. However, this argument is ill-conceived. If Plaintiff had the evidence to suggest a similarly situated non-Black co-worker was treated more favorably than he was with respect to an adverse employment action, he would have challenged the preliminary ruling and presented it. He knew this was his burden and the only way to prevail. Yet Plaintiff did not even proffer any evidence suggesting such a finding. The evidence simply never existed.

The record of the motion in limine hearing and the trial makes this point clear.[7] During the hearing on the Motion in Limine, Plaintiff's only argument on this topic was the "letter of termination" (Trial Ex. 11) indicated Plaintiff was "compared side by side with what his peers were doing." (TR Hearing 4/15/21 at 20:10-12.) This Court rejected Plaintiff's argument in its preliminary ruling because the document

[7] A ruling on a motion in limine is only a preliminary ruling and subject to revision as evidence is presented during a trial. Indeed, Plaintiff knew this as this Court reversed another preliminary limine ruling excluding evidence of alleged backpay damages as Plaintiff argued the Court should at least hear proffered evidence. The Court did so and allowed the jury to return an advisory verdict as to backpay.

itself did not provide any factual basis whatsoever with respect to a non-Black individual engaging in conduct similar to conduct Plaintiff was accused of engaging in (i.e., not being able to meet the program's minimum performance standards).

As mentioned above, during a sidebar conference at trial, as Plaintiff was about to testify in contravention of this Court's ruling on the motion in limine on this point, Plaintiff again suggested evidence of "peer average" as notated on the "letter of termination" somehow opened the door to individual performance of peers. (TR Trial 5/20/21 at 93:1 – 96:6.) However, it was clear, and this Court agreed, "peer average" as used in that document was not the same as evidence establishing any specific non-Black individual had engaged in conduct similar to conduct Plaintiff engaged in and was treated more favorably as required by applicable law. Indeed, this Court aptly noted Plaintiff had wholly failed to develop any of this evidence supporting his theories in discovery. (TR Trial 5/20/21 at 95:20-23; 98:4 - 8.) After this Court again instructed evidence of peers who were not shown to be similarly situated could not come into evidence, Plaintiff first asked to proffer evidence and then, before the Court ruled on such request, Plaintiff announced: "I will move on; I will abide by the ruling," and then, in response to the Court stating, "So the problem is I can't allow you to go into information –," Plaintiff stated: "Sir, I'm not going to do it. I'm not going to do it." (TR Trial 5/20/21 at 98:9-13; 100:8-19; 101: 14-17.)

Thus, while Plaintiff suggested he could provide the proof necessary to establish race discrimination, when it came time to do so, he could only point to a document which did nothing to present even a scintilla of evidence any other similarly situated co-worker was treated more favorably than he was. And, Plaintiff never identified nor attempted to offer anything else – because no evidence exists.

Further, as this Court recognized in granting the directed verdict on this claim, without this proof, Plaintiff's race discrimination claim fails. Despite having had three and a half years to find pertinent evidence of any kind to support his theory similarly situated non-Black employees were treated more favorably than he was, Plaintiff did nothing to back up the frivolous allegations in his Complaint of race discrimination. Instead, he continued to litigate baselessly, forcing Florida Hospital to continue to expend money in defense of the unsupportable allegations.

With respect to the relevant factors in awarding a prevailing defendant its fees, it is undisputed Plaintiff failed to establish even a *prima facie* case of race discrimination. Next, Defendant acknowledges it made a cost-of-defense / nuisance settlement offer to Plaintiff. These offers were, on their face, simply economic decisions to eliminate further financial expenses associated with continued defense of the lawsuit. Indeed, after the offer of judgment was made, Florida Hospital

expended another significant amount of attorneys' fees and costs[8]. In short, in offering to settle the matter, Florida Hospital measured prospective litigation and business disruption expenses against a settlement amount, and dispassionately concluded the former was economically efficient. Further, Plaintiff's settlement demand throughout this litigation was astronomical.[9] Finally, as this Court should note, only 15 percent of civil federal filings proceed past the pre-trial conference largely because defendants in employment matters achieve settlements *without* giving any credence to plaintiffs' claims based solely on the economic realities of protracted litigation.[10] Florida Hospital submits despite having made a settlement offer, this Court should view this factor in Defendant's favor or, at worst, as neutral. As such, Florida Hospital is entitled to recover its attorneys' fees and expenses expended in defense of this claim.[11]

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[8] Littler Mendelson is currently in the process of finalizing the bill encompassing the time spent in May 2021 and expects to send it to Florida Hospital in the next week. Florida Hospital will provide to this Court an updated memorandum and declaration relating to the additional costs that have not, as of the time of filing this Motion, been billed.

[9] Florida Hospital respectfully acknowledges the *Sullivan* standard contemplates the Court assessing the amount of settlement offers. Florida Hospital will present the Court evidence, other than that of the Offer of Judgment, preferably *in camera*, of the settlement negotiations should the Court find this evidence necessary to make a determination on entitlement to a fee and cost award.

[10] *See* United States District Courts – Civil, Facts & Figures at: http://www.uscourts.gov/sites/default/files/table4.10_0.pdf

[11] Although this case did survive a summary judgment motion, it is clear from this Court's determination once listening to all admissable evidence actually presented directed verdicts were appropriate on at least three of the four claims, the claims should have been dismissed even before the finality of the trial. Indeed, the national origin and disability claims were dismissed prior to a jury verdict and thus prior to a full trial on the merits. Further, although this Court reserved ruling on the directed verdict motion on the race discrimination claim to consider Plaintiff's unsupported argument attempting to change the required proof necessary to succeed on his claim, the directed verdict was ultimately granted. Due to the logistics of only having a courtroom available during the COVID-19 pandemic for a one-week period and Plaintiff's case consuming more than four of the five days available for trial, this Court did not have the luxury considering the novel argument and pause before having Florida Hospital proceed with the presentation of its case as well as closing argument and submission to the jury. Last, had the jury not found for Florida

2. Plaintiff's National Origin Discrimination Claim

The burdens of proof to establish a claim of discrimination based on national origin are the same as discussed above. *See Palm Beach County Sch. Bd. v. Wright*, 217 So. 3d 163 (Fla. 4th DCA 2017). However, despite having presented the same evidence of national origin discrimination as race discrimination in his case (i.e., he was a member of a protected class and was subjected to an adverse action), Plaintiff not only continued to pursue this claim all the way through his presentation to the jury, but then seemingly abandoned it, or at least failed to argue against directed verdict on it. As to this claim in opposition to Florida Hospital's motion for directed verdict, Plaintiff stated:

> The plaintiff concedes that the only evidence that existed with respect to national origin is the conversation about rotating back to Africa, go back to Africa to do your rotation. Plaintiff concedes there's not much there based upon how the evidence came in, okay? So I'm not going to waste the Court's time on discussing that.

(TR Trial 5/21/21 at 113:18-24.) In addition to not having any evidence a non-Kenyan employee who engaged in conduct similar to his conduct being treated more favorably, amazingly, he tried to blame the fact he maintained a claim he admits lacks evidence on how the evidence "came in" despite being in total control of what evidence was presented. When pressed on this issue during argument and asked

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Hospital on the retaliation claim, this Court would have also likely granted directed verdict on that claim given Plaintiff did not present evidence supporting a *prima facie* case.

whether Plaintiff was abandoning the claim, Plaintiff merely replied, "I didn't make an argument." (TR Trial 5/21/21 at 120:5-9.)

Upon Plaintiff's lack of opposition to the motion for directed verdict on this claim, the Court granted Florida Hospital's motion and directed the verdict in favor of Florida Hospital. (TR Trial 5/21/21 at 133:6-7.) Plaintiff certainly knew it was frivolous, unreasonable, and groundless to pursue his claim of national origin discrimination from the beginning, yet persisted, thus necessitating expense of attorneys' fees Plaintiff could have prevented. Just as analysis of the *Sullivan* factors requires an award of fees to Florida Hospital on the race claim, a similar analysis here necessitates a finding this count, too, was frivolous. Thus, fees should be awarded to Florida Hospital on this claim.

3. Plaintiff's Disability Discrimination Claim

Plaintiff's disability discrimination claim was, like his national origin discrimination claim, dismissed by this Court after Plaintiff had a full opportunity to present any available admissible evidence. Like the race and national origin discrimination claims, he also failed to present evidence to meet his burdens and establish a *prima facie* case of discrimination due to any disability. Unlike a claim for race or national origin discrimination under the FCRA, to succeed on a claim of disparate treatment discrimination based on disability, a plaintiff must establish but-for his disability, he would not have suffered the adverse action at issue. *See Smith*

v. Avatar Properties, Inc., 714 So. 2d 1103 (Fla. 5th DCA 1998) (a *prima facie* case of disability discrimination under the FCRA requires a plaintiff show he or she was dismissed solely because of his disability). The evidence simply did not, in any light, support such a finding.

Indeed, during argument on the motion for directed verdict, the Court specifically asked Plaintiff what evidence he believed supported his disability discrimination claim. The Court commented, "Is there any evidence relating the disability to the termination? I'm just trying to understand that." (TR Trial 5/21/21 at 123:23-25). Plaintiff acknowledged, in response, there was no direct evidence of such, but argued, "I think you can seize on Dr. Portuguese's words: He will be permitted to continue in the program if he gets his health issues right." (TR Trial 5/21/21 at 124:1-11). However, as this Court noted, Dr. Portuguese's comment was that he could return to the program if he was able to do the work (after having been out due to mental health issues unrelated to the disability). (TR Trial 5/19/21 at 59:19-22; TR Trial 5/21/21 at 124:9-18.) This is the only evidence Plaintiff identified in support of his disability claim and, indeed, no other evidence was presented.[12] Thus, this Court rightfully concluded no jury following the law could possibly find Florida Hospital would not have dismissed Dr. Rop but for his

[12] Further, the person saying this comment was not make the decision maker. The evidence clearly established Dr. Laura Bancroft was the person who made the dismissal decision, not Dr. Portuguese.

disability and properly directed verdict in favor of Defendant on the disability discrimination claim because Plaintiff did not establish his *prima facie* case.

For the same reasons set forth above analyzing the *Sullivan* factors for the race claim, this Court must also conclude an award of attorneys' fees on the disability claim is appropriate.

4. Plaintiff's Retaliation Claim

To prevail on a retaliation claim under the FCRA, a plaintiff must establish he engaged in protected activity, was subject to an adverse employment action and some causal connection between the two. The evidence suggested Plaintiff engaged in what might be considered "protected activity" both in March 2017 and again on November 17, 2017. The unrebutted evidence presented also relayed the dismissal decision was made prior to the November 17, 2017 protected activity. Therefore, as to the November 17, 2018 protected activity, Plaintiff could not, as a matter of law, have established retaliation. *See Myers v. Cent. Fla. Invs., Inc.*, 237 Fed. Appx. 452, 457 (11th Cir. 2007) (finding no causal link between plaintiff's protected actions and her discharge because the defendant decided to discharge the plaintiff before she engaged in protected activity). Further, with respect to the alleged protected activity in March 2017, Plaintiff testified he complained "about Dr. Bancroft" to Dr. Scherer. Then, the decision to dismiss him from the program occurred in November 2017 and was carried out in February 2018. Thus, at best, there was an eight-month delay

between the protected expression and the decision to discharge. There was absolutely no other evidence to support Plaintiff's theory he would have been terminated but for his complaints. However, without more, the time between protected activity and the adverse action must be "very close" to support a finding of retaliation. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Further, a three to four-month disparity between the statutorily protected expression and the adverse employment action is not enough. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (internal citations omitted). Indeed, the Court in *Cooper Lighting* announced, "in the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law." *Id.* at 1364.

Here, the only evidence of retaliation was Plaintiff complained and, in March 2017, almost a year before Plaintiff was actually dismissed, Plaintiff testified Dr. Scherer told him he should not file a grievance against the hospital because the hospital would not like it. (TR May 20, 2021 at 88: 20 – 89:1). The decision to dismiss him from the program, though, did not happen for another eight months. (TR Ex. 11.) Thus, as a matter of law, the jury could not have found a connection and could not have found retaliation occurred. Here, Plaintiff also failed to present a *prima facie* case of retaliation at trial. Importantly, the jury returned a verdict in favor of Defendant on Plaintiff's retaliation claim.

Again, using the same analysis of the second and third *Sullivan* factors with respect to awarding a prevailing defendant attorneys' fees and costs, given the fact Plaintiff could not and did not have evidence and knew he did not have evidence to even make out a *prima facie case*, this Court should award Florida Hospital its reasonable attorneys' fees and costs.

B. Florida Hospital is Additionally Entitled to Reasonable Attorneys' Fees and Costs Because Plaintiff Rejected a Valid Offer of Judgment

Florida Hospital is additionally entitled to recover its reasonable attorneys' fees and costs incurred after March 18, 2021, the date on which it served a valid Proposal for Settlement which Plaintiff later rejected. Rule 1.442, Florida Rules of Civil Procedure, provides requirements under which a proposal for settlement can be made and further directs in subsection (h)(1), "any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with Rule 1.525."[13] Further, in determining reasonable attorneys' fees and costs, Rule 1.442(h)(2) provides the Court shall consider: the then-apparent merit or lack of merit in the claim; the number and nature of proposals made by the parties; the closeness of questions of fact and law at issue; whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the

[13] Rule 1.525, Florida Rules of Civil Procedure, requires any party seeking a judgment taxing costs and/or fees to serve a motion no later than 30 days after filing the judgment.

reasonableness of the proposal; whether the suit was in the nature of a test case reaching matters of importance affecting non-parties; and the amount of additional delay cost and expense the party making the proposal would be expected to incur if the litigation were to be prolonged.

Each of these factors weighs in favor of Florida Hospital recovering its attorneys' fees and costs incurred as of the date of the offer. As set forth above, as of March 2021, the lack of merit of all of Plaintiff's claims was very apparent as Plaintiff had no evidence establishing a *prima facie* case as to any of his claims. There was no evidence Florida Hospital (had it refused to furnish that) would have allowed Plaintiff to evaluate the claim, and the lawsuit does not present issues of importance affecting non-parties. Last, due to the refusal of Plaintiff to accept the offer proposed in good faith, Florida Hospital incurred additional fees and costs.

Therefore, in addition to being entitled to attorneys' fees and costs as a prevailing party under the FCRA, Florida Hospital is additionally entitled to sanctions against Plaintiff for his refusal to accept the reasonable good-faith settlement proposal properly served on him on March 18, 2021.

C. The Amount of Attorneys' Fees and Costs are Reasonable.

A reasonable attorneys' fee under Title VII, section 2000e-5(k), is "properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonably hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *see also*

Cullens v. Ga. Dep't of Transportation, 29 F.3d 1489, 1491-92 (11th Cir. 1994). "The fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates." *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988).

As set forth in the declaration of Jeffrey B. Jones submitted herewith, Florida Hospital has incurred $229,396.40 in attorneys' fees and $6,758.81 in non-taxable costs in connection with this litigation.[14] *See* Declaration of J. Jones (the "Declaration"). The Declaration demonstrates the legal fees Florida Hospital incurred were based on reduced hourly rates and the associated hours and litigation costs were reasonable based on the scope and duration of the litigation. Declaration ¶¶ 19-20.

III. Conclusion

WHEREFORE, Defendant Florida Hospital respectfully requests this Court enter an order awarding it reasonable attorneys' fees and costs in an amount to be determined as specified in the Declaration as well as in supplemental evidence to be filed and presented and granting Defendant such further relief as this Court finds just and proper.

[14] Notably, even if this Court found one claim not frivolous, it must apportion and award fees for those claims which were frivolous despite the denial of fees for another claim. *See Quintana v. Jenne*, 414 F.3d 1306 (11th Cir. 2005).

Dated this 25th day of June, 2021.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June, 2021, I electronically served the foregoing via email to the following: Jerry Girley, The Girley Law Firm, PA, 125 East Marks Street, Orlando, Florida 32803 at bianca@thegirleylawfirm.com; phyllis@thegirleylawfirm.com.

/s/ Kimberly J. Doud
Kimberly J. Doud